

**WEST VIRGINIA PUBLIC EMPLOYEES
GRIEVANCE BOARD**

SYNOPSIS REPORT

Decisions Issued in March 2013

The Board's monthly reports are intended to assist public employers covered by a grievance procedure to monitor significant personnel-related matters which came before the Grievance Board, and to ascertain whether any personnel policies need to be reviewed, revised or enforced. W. Va. Code §18-29-11(1992). Each report contains summaries of all decisions issued during the immediately preceding month.

If you have any comments or suggestions about the monthly report, please send an e-mail to wvgb@wv.gov.

NOTICE: These synopses in no way constitute an official opinion or comment by the Grievance Board or its administrative law judges on the holdings in the cases. They are intended to serve as an information and research tool only.

TOPICAL INDEX
HIGHER EDUCATION EMPLOYEES

KEYWORDS: Evaluations; Policy; Harassment; Reprisal; Arbitrary and Capricious; Professional Judgment; Student Evaluations; Global Questions; Personnel File; Teaching; Service

CASE STYLE: Subramani v. West Virginia University
DOCKET NO. 2011-1704-WVU (3/15/2013)

PRIMARY ISSUES: Whether the professional judgment of Grievant's evaluators was unreasonable and in disregard to the facts.

SUMMARY: Grievant contends that he should have received a rating of excellent in teaching and in service on his 2010 faculty evaluation. Faculty evaluations of teaching, research and service are subjective, and the professional judgment of those at the institution who are charged with such evaluations is entitled to great deference. A Grievant seeking to have his evaluation overturned by the Grievance Board bears a substantial burden. Grievant failed to demonstrate that the ratings on his faculty evaluation were arbitrary and capricious, or the result of discrimination. Grievant also failed to prove his claims of reprisal and harassment.

TOPICAL INDEX
COUNTY BOARDS OF EDUCATION
SERVICE PERSONNEL

<u>KEYWORDS:</u>	Correctable Conduct; Improvement Opportunity; Insubordination; Suspension; Willful Neglect of Duty; Performance Issues
<u>CASE STYLE:</u>	<u>Mullins v. McDowell County Board of Education AND Department of Education</u> DOCKET NO. 2012-0671-McDED (3/14/2013)
<u>PRIMARY ISSUES:</u>	Whether a five-day suspension was appropriate for Grievant's conduct.
<u>SUMMARY:</u>	Grievant was suspended for five days without pay for conduct including failure to set the parking brake on her bus at all stops, failure to drive with both hands on the steering wheel at all times, raising her voice toward students on her bus, failure to wear her seat belt at all times, and for having a conversation through the side window of the bus with a parent who had approached the bus with questions about her child who rode the bus. Grievant disputes some of these allegations, but argues that because the conduct was performance-related, Respondents were required to give her an opportunity to improve before suspending her. Respondents argue that Grievant's conduct constituted insubordination and willful neglect of duty; therefore, they did not have to offer Grievant an opportunity to improve before suspending her. Respondent failed to meet its burden of proving insubordination and/or willful neglect of duty. The conduct was performance-related and correctable. As such, Respondents were required to grant Grievant an opportunity to improve before suspending her. Accordingly, the grievance is GRANTED.

<u>KEYWORDS:</u>	Extracurricular Assignments; Seniority; Non-Selection; Employee; Statutory Time Limits
<u>CASE STYLE:</u>	<u>VanMeter v. South Branch Career and Technical Center</u> DOCKET NO. 2013-0728-SBCTCDEF (3/22/2013)
<u>PRIMARY ISSUES:</u>	Whether Grievant has standing to pursue his claim through the grievance procedure.
<u>SUMMARY:</u>	Grievant filed a written notice of default at level one of the grievance procedure based on the failure of Respondent to schedule a level one hearing. The facts indicate that Grievant is not an employee of Respondent, and seeks to challenge his unsuccessful application for employment. It is well settled that a grievant may not use the grievance procedure to challenge an action that was not taken by his or her employer. Grievant's request for default is denied, and this grievance is dismissed from the docket.
<u>KEYWORDS:</u>	Extra-Duty Assignments; Extracurricular Assignments; Summer Jobs; Correct Daily Rate; Regular Hourly Rate; Total Daily Rate
<u>CASE STYLE:</u>	<u>Salmons, et al. v. Lincoln County Board of Education</u> DOCKET NO. 2012-0223-CONS (3/8/2013)
<u>PRIMARY ISSUES:</u>	Whether Grievants received the proper pay for a summer extracurricular assignment.
<u>SUMMARY:</u>	Grievants alleged that they were entitled to be paid one seventh of their hourly rate of pay for extra-duty assignments they performed for the Board in the summer of 2011. They believed that their hourly rate should be calculated by adding their pay for their regular job and any extra jobs they were performing before the pay was divided by seven. Respondent argued that Grievants regular pay should be arrived at by dividing only Grievants' regular bus run salaries by seven. The plain wording of the posting for the positions required that the employees be paid their regular hourly rate, not their "daily total salary" as required for extra-duty assignments.

<u>KEYWORDS:</u>	Rational Nexus; Job Responsibilities; Felony Charges; Misdemeanor Criminal Offense; Off Duty Conduct; Insubordination
<u>CASE STYLE:</u>	<u>Clark v. Kanawha County Board of Education</u> DOCKET NO. 2013-0123-KanED (3/27/2013)
<u>PRIMARY ISSUES:</u>	Whether Respondent demonstrated, by a preponderance of the evidence, that Grievant's off duty conduct is sufficient ground to terminate her employment. Whether Respondent demonstrated a "rational nexus" between the acknowledged conduct performed outside the job and the duties Grievant preforms.
<u>SUMMARY:</u>	<p>Respondent dismissed Grievant from employment as a custodian subsequent to a plea of guilty to the offense of purchasing substances to be used as precursor to manufacture methamphetamine. Grievant argues that her employment should not be terminated for off duty conduct that has no rational nexus with her job responsibilities. Grievant highlights that a plea of guilty to a misdemeanor does not, in and of itself, demonstrate sufficient cause for termination.</p> <p>A county board of education is authorized to discipline an employee for one or more of the causes listed in W. Va. Code § 18A-2-8, as amended, and action must be exercised reasonably, not arbitrarily or capriciously. Relevant case law demonstrates, the requirement that a rational nexus be established between off duty conduct related to a misdemeanor and an employee's job duties to lawfully terminate employment.</p> <p>Respondent did not meet its burden of proving Grievant's conduct constituted insubordination. Further, it was not established, by a preponderance, that a rational nexus existed between the off duty conduct of Grievant and her assigned duties and/or that the notoriety of Grievant's actions reached a level sufficient to justify the termination of her employment as a custodian. This grievance is GRANTED.</p>

TOPICAL INDEX
STATE EMPLOYEES

<u>KEYWORDS:</u>	Discrimination; Favoritism; Work-Related Injury; Return to Work; Modified Duty; Restrictions
<u>CASE STYLE:</u>	<u>Kimble v. Division of Highways</u> DOCKET NO. 2012-0062-DOT (3/29/2013)
<u>PRIMARY ISSUES:</u>	Whether Grievant proved his claims of discrimination and favoritism.
<u>SUMMARY:</u>	Grievant sustained a work-related injury to his shoulder which required him to be off from work for a period of time. Grievant presented his supervisor with a doctor's slip allowing him to return to work with the following restrictions: "no use of LUE [left upper extremity], if cannot accommodate pt [patient] will need to remain off work." Respondent did not allow Grievant to return to work on light, or modified duty. Grievant was later allowed to return to work when he could return at full duty. Respondent allowed another employee to return to work on light, or modified duty following a work-related injury to his elbow. Grievant asserts that Respondent discriminated against him and engaged in favoritism in its refusal to allow him to return to work on modified duty. Respondent denies Grievant's claims. Grievant failed to meet the burden of proving his claims by a preponderance of the evidence. Therefore, this grievance is DENIED.

<u>KEYWORDS:</u>	Excessive Force; Insubordination; Unprofessional Conduct; Physical Altercation; Disciplinary Action; Mitigation
<u>CASE STYLE:</u>	<u>Evans v. Regional Jail and Correctional Facility Authority/Southwestern Regional Jail</u> DOCKET NO. 2012-1500-CONS (3/8/2013)
<u>PRIMARY ISSUES:</u>	Whether Grievant used excessive force against an inmate and was insubordinate and whether Grievant is entitled to mitigation of the discipline imposed.
<u>SUMMARY:</u>	Grievant was terminated for inappropriate and excessive use of force against an inmate, insubordination, unprofessional conduct and the threat to discipline an inmate. Respondent proved that Grievant used excessive force and was in violation of various policies and procedures of the Regional Jail and Correctional Facility Authority. Grievant failed to demonstrate that Respondent's disciplinary action taken against her was retaliatory or improper in any way. Grievant also failed to show that termination was too severe a punishment or that mitigation was warranted under these circumstances. Grievant's termination was justified and appropriate. The grievance is DENIED.

KEYWORDS: Misconduct; Abuse of a Resident; Manhandle a Resident; Spitting; Fast Temper; Aggressive Behavior

CASE STYLE: Stump, Jr. v. Division of Veteran's Affairs
DOCKET NO. 2011-0127-MAPS (3/8/2013)

PRIMARY ISSUES: Whether Respondent has proven its allegations of misconduct by a preponderance of the evidence.

SUMMARY: The record of this grievance established that Grievant engaged in abuse of a resident at Respondent's nursing facility. Respondent met its burden of proof and established by a preponderance of the evidence that Grievant had been rough to a resident, mishandled him, and engaged in loud and confrontation behavior. Grievant engaged in misconduct of a substantial nature and the dismissal is upheld.

KEYWORDS: Misuse of the State's Computer System; Personal Business; Breach of Confidentiality; Arbitrary and Capricious; Abuse of Discretion

CASE STYLE: Ponce v. Department of Health and Human Resources/Bureau for Child Support Enforcement
DOCKET NO. 2012-1272-DHHR (3/18/2013)

PRIMARY ISSUES: Whether Respondent proved its discipline of Grievant for violation of its rules and policies was appropriate, and whether Grievant's misconduct justified termination.

SUMMARY: Grievant was terminated for overuse and misuse of the state computer and e-mail systems by accessing them to establish a commercial venture, specifically a coffee business, and for other personal matters. In addition, Grievant was terminated for divulging confidential information from the BCSE database to third parties who were unauthorized to receive such information. Respondent proved that Grievant violated agency policies and procedures concerning computer and e-mail use by spending extensive amounts of time on her state-owned computer in an effort to establish a personal business. In addition, Respondent proved that Grievant improperly disclosed confidential information to unauthorized individuals. Grievant's termination was justified and appropriate.

<u>KEYWORDS:</u>	Moot; Voluntary Retired; Issues
<u>CASE STYLE:</u>	<u>Hylton v. Department of Health and Human Resources/Jackie Withrow Hospital and Division of Personnel</u> DOCKET NO. 2011-1774-DHHR (3/27/2013)
<u>PRIMARY ISSUES:</u>	Whether this grievance is moot because Grievant retired before the Grievance Board decided this matter.
<u>SUMMARY:</u>	Grievant voluntarily retired from her position as a Health Service Worker with Respondent on or around October, 26, 2012. Because Grievant retired before the Grievance Board conducted a Level Three hearing or rendered a decision in this grievance this matter is moot.
<u>KEYWORDS:</u>	Paid 30 Minute Lunch Break; Food Preparation; Serving the Food; Classification; Arbitrary and Capricious
<u>CASE STYLE:</u>	<u>Quinn v. Department of Health and Human Resources/William R. Sharpe, Jr. Hospital</u> DOCKET NO. 2011-1654-CONS (3/15/2013)
<u>PRIMARY ISSUES:</u>	Whether Respondent's management decisions were clearly wrong or the result of an abuse of discretion.
<u>SUMMARY:</u>	Grievant is employed as a Food Service Worker at the William R. Sharpe, Jr. Hospital. She challenges the payment method used by Respondent concerning her lunch break. She challenges the use of Food Service Workers as Cooks, arguing that she is working out of her classification. Finally, she complains that Respondent is short-staffing in the Dietary Department at the hospital. Grievant did not establish by a preponderance of the evidence that Respondent's management decisions were clearly wrong or the result of an abuse of discretion. In addition, Grievant did not demonstrate by a preponderance of the evidence that Respondent's lunch break payment method was a violation of any statute, policy, or rule.
<u>KEYWORDS:</u>	Patient Neglect; Failure To Secure A Door; Safety Precautions; Elopement Attempt; Escape The Unit; One-On-One Supervision
<u>CASE STYLE:</u>	<u>Dickerson v. Department of Health and Human Resources/Mildred Mitchell-Bateman Hospital</u> DOCKET NO. 2012-1313-DHHR (3/29/2013)
<u>PRIMARY ISSUES:</u>	Whether Grievant was negligent in her failure to ensure patient safety by not securing a door.
<u>SUMMARY:</u>	Grievant was charged with failure to adhere to hospital policies while performing her duties as a Health Service Worker. Respondent met its burden of proof and demonstrated by a preponderance of the evidence that Grievant's five-day suspension was for good cause.

<u>KEYWORDS:</u>	Probationary Employee; Job Performance; Attendance Issues; Unscheduled Leave Usage; Failing to Meet Expectations; Undependable; Unsatisfactory Performance
<u>CASE STYLE:</u>	<u>Camp v. Department of Health and Human Resources/Lakin Hospital</u> DOCKET NO. 2012-1408-DHHR (3/25/2013)
<u>PRIMARY ISSUES:</u>	Whether Grievant meet her burden of proving her job performance was satisfactory.
<u>SUMMARY:</u>	Grievant, a probationary employee, was terminated for unsatisfactory performance at the end of her six-month probation period. Grievant's job skills were satisfactory, but she was frequently absent from work. Grievant's absences rendered her undependable; therefore she could not meet her burden of proving her performance was satisfactory. Accordingly, the grievance is denied.
<u>KEYWORDS:</u>	Salary Advancement; Discretionary Increase; Pay Grade; Classification; Pay Plan Implementation Policy; Equal Pay for Equal Work; Merit Raise; Arbitrary and Capricious
<u>CASE STYLE:</u>	<u>Conrad v. Division of Motor Vehicles and Division of Personnel</u> DOCKET NO. 2012-0369-DOT (3/18/2013)
<u>PRIMARY ISSUES:</u>	Whether Respondents' actions of not increasing Grievant's salary further is lawful or arbitrary and capricious conduct.
<u>SUMMARY:</u>	<p>Grievant avers that the West Virginia Division of Motor Vehicles and Division of Personnel, Respondents, have not adequately increased his compensation within the Pay Plan Policies currently in effect. Grievant is protesting salary adjustment(s) which are lower than he believes are appropriate after receiving a promotion to a Director position. Among other contentions, Grievant avers that if merit raises are prohibited by the current administration, and Respondents cannot or will not request or approve merit raises, then the statutorily mandated merit system for civil servants is not being adhered to by Respondents.</p> <p>Grievant's employing state agency, the Division of Motor Vehicles, is not necessarily opposed to granting Grievant an increase in salary. Nevertheless, relevant rules, regulations and operating directives restrict the amount of salary increases which can functionally be granted to Grievant. Grievant did receive pay increases. At all times relevant to this matter, Grievant was both properly classified and paid within the appropriate pay scale for his classification. Grievance Denied.</p>

KEYWORDS: Seniority; Qualifications; Supervisory Experience; Work History; Salary; Interview Scoring; Subjective; Interview; Arbitrary and Capricious

CASE STYLE: Murphy v. Regional Jail and Correctional Facility Authority/Tygart Valley Regional Jail
DOCKET NO. 2012-1264-MAPS (3/26/2013)

PRIMARY ISSUES: Whether Respondent violated the statutory provision related to seniority in the selection process, and whether the selection was conducted in an arbitrary and capricious manner.

SUMMARY: Grievant was not selected for a newly created Administrative Services Assistant I position at the Tygart Valley Regional Jail, which was a Human Resources position for the facility. Grievant had been performing many of the duties of the position at the facility for several years, and her work had been essential to getting the facility operational at its inception. She was seen by her supervisors as a skilled, excellent employee. The successful applicant had been a state employee for less than two years, and had no experience or education in the area of human resources, but was selected because the interviewers preferred her based on her performance in the interview, and it would cost less in terms of salary requirements to place her in the position. Grievant demonstrated that Respondent violated the statute which requires that consideration be given to seniority in situations such as this, and that the selection was made in an arbitrary and capricious manner.

KEYWORDS: Tardiness; Attendance Policy; Reliability; Progressive Discipline; Improvement Plans; Deficiencies; Performance Expectations; Essential Functions; Job Duties; Americans with Disabilities Act

CASE STYLE: Anderson v. Department of Health and Human Resources/Mildred Mitchell-Bateman Hospital
DOCKET NO. 2012-0804-CONS (3/27/2013)

PRIMARY ISSUES: Whether Respondent had good cause to terminate Grievant.

SUMMARY: Grievant was terminated from her position as Weekend Nursing Supervisor after repeated tardiness and other performance deficiencies persisted over the course of four years and multiple counseling and disciplinary actions. Grievant alleged she was entitled to an accommodation under the Americans with Disabilities Act. Grievant did not provide sufficient information to Respondent for it to determine if accommodation was required or reasonable. Regardless, the requested accommodation was likely not reasonable due to the essential functions of Grievant's key position. Respondent met its burden of proof that it had good cause to terminate Grievant.

<u>KEYWORDS:</u>	Termination; Classified Exempt, At-Will; Substantial Public Policy
<u>CASE STYLE:</u>	<u>Berlin, Jr. v. Regional Jail and Correctional Facility Authority/Central Office</u> DOCKET NO. 2012-0681-MAPS (3/14/2013)
<u>PRIMARY ISSUES:</u>	Whether Grievant met his burden of proving by a preponderance of the evidence that he was terminated in violation of substantial public policy.
<u>SUMMARY:</u>	Grievant was terminated from a classified-exempt, at-will position he held with the Respondent. Grievant asserted that his termination violated substantial public policy. Respondent denied Grievant's claims, and asserted Grievant's termination was proper under the law. Grievant failed to meet his burden of proving that his termination violated substantial public policy. Accordingly, the grievance is DENIED
<u>KEYWORDS:</u>	Violating Policy; Patient Abuse; Nonviolent Physical Crisis Intervention Principles; Patient Restraint; Unnecessary Use of Force
<u>CASE STYLE:</u>	<u>Moody v. Department of Health and Human Resources/Mildred Mitchell-Bateman Hospital</u> DOCKET NO. 2012-1160-CONS (3/21/2013)
<u>PRIMARY ISSUES:</u>	Whether Grievant used excessive force with a patient to the extent that it constituted "abuse" as defined by Policy MMBHE018.
<u>SUMMARY:</u>	Grievant was suspended and ultimately dismissed from employment for allegedly using improper restraint with a patient in violation of Hospital policy. Grievant argues that he was forced to restrain the patient and he used the least force necessary under the circumstances. Respondent proved that Grievant used excessive force and failed to follow proper Hospital procedures in restraint of a patient. Accordingly, the grievance is DENIED.

<u>KEYWORDS:</u>	Violating Policy; Suspending Child Support Arrearage Payments; Proper Authorization; Being Involved in Cases of Friends, Relatives or Co-Workers
<u>CASE STYLE:</u>	<u>Plantz v. Department of Health and Human Resources/Bureau for Child Support Enforcement</u> DOCKET NO. 2012-0756-DHHR (3/13/2013)
<u>PRIMARY ISSUES:</u>	Whether Grievant culpably participated in action to suspend her husband's child support payments to his ex-wife in violation of conflict of interest rules.
<u>SUMMARY:</u>	Grievant was dismissed from her employment by Respondent for asking a co-worker to place a suspension on payments from the child support account of her husband, OP, to OP's ex-wife, RP, in Respondent's computer system, contrary to the agency's established conflict of interest policies. These suspensions, or "stops," were initiated in the computer system by Kelli Harrah, a BCSE employee working in the Employer Relations Unit. When questioned by her supervisors, Ms. Harrah provided a hand-written statement indicating that Grievant had asked her to take this action because it had been ordered by the judge, and the caseworker would not take action to implement the suspensions. When Grievant was asked about these events, she initially denied having asked Ms. Harrah for assistance but then verbally admitted requesting the suspensions. Grievant also provided a hand-written statement acknowledging that she discussed the situation with Ms. Harrah who told her that "she could OT the case for allocations and disbursements." Respondent presented preponderant evidence that Grievant involved another employee in her husband's child support case in violation of the agency's conflict of interest policies.